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No. .....

IN THE

Supreme Court of the United States

October Term, 1981

VINCENT B.,

Plaintiff and Appellant,

vs.

JOAN R., *et al.*,

Defendants and Respondents.

JURISDICTIONAL STATEMENT.

LAWRENCE & LAWRENCE,
A Law Corporation,
SULL LAWRENCE,
9454 Wilshire Boulevard,
Suite 209,
Beverly Hills, Calif. 90212,
(213) 275-5114,
Counsel for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Question Presented.

Whether the conclusive presumption of California Evidence Code Section 621 which operates to deny appellant, a natural father, from establishing his parental status and obtaining his parental and visitation rights, denies appellant and the minor child due process of law and equal protection of the laws as secured by the Fourteenth Amendment to the United States Constitution.

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JURISDICTIONAL STATEMENT.

JURISDICTION.

The Judgment of the Court of Appeals was filed on December 8, 1981. Petition for hearing before the California Supreme Court was timely filed on January 18, 1982. On February 17, 1982 the California Supreme Court denied Appellant's Petition for Hearing. On April 24, 1982 the Appellant filed with the Supreme Court of the State of California a Notice of Appeal to the Supreme Court of the United States. This Court has jurisdiction pursuant to Title 28, U.S.C. §1257(2). That 28 U.S.C. §2403(b) may be applicable and this jurisdictional statement shall be served upon Attorney General of the State of California.

CONSTITUTIONAL AND STATUTORY AUTHORITY.

Fourteenth Amendment of the United States Constitution.

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Evidence Code Section 621.

"Notwithstanding any other provision of law, the issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."

California Civil Code Section 4601.

"Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child."

California Code of Civil Procedure Section 436c.

". . . Summary Judgment shall not be granted by the Court based on inferences reasonably deducible from such evidence if contradicted by other inferences or evidence, which raise a triable issue as to any material fact."

STATEMENT OF CASE.

On September 14, 1977, and Appellant, VINCENT L. BRIGGS (herein referred to as "Appellant"), filed his First Amended Complaint to Establish a Father and Child Relationship with Zan Ross (herein referred to as "Zan") born May 11, 1970 and For Visitation Rights. Appellant asserts that he is the natural father of Zan. The First Amended Complaint also establishes facts which demonstrate that he is a person interested in the welfare of Zan and entitled to visitation rights under Civil Code Section 4601, irrespective of the issue of paternity.

The Complaint was filed after Respondent, JOAN ROSS (herein referred to as "Joan Ross"), the mother of Zan, terminated the visitation of Appellant which had been continuous since the birth of Zan seven years earlier.

The Respondents (referred to herein collectively as the "Respondents") demurred to Appellant's First Amended Complaint based upon the presumption created by Evidence Code Section 621. Judge Laurence J. Rittenband sustained their demurrer. However, on appeal to the Court of Appeal, that ruling was reversed.

The Respondents then petitioned the Supreme Court of California for a hearing. That petition was denied.

Upon the matter being returned to the Superior Court, the Respondents moved for a Summary Judgment.

The Respondents' Motion for Summary Judgment was based primarily on Evidence Code Section 621 and the argument that the Appellant was precluded from presenting evidence of the paternity of the minor based on the conclusive presumption in Evidence Code Section 621. The Appellant contended that Evidence Code Section 621 was unconstitutional in that it denied Appellant due process and equal protection of the law and that under the circumstances of this case Evidence Code Section 621 should not apply.

Pursuant to the facts admitted by the pleadings and the declarations filed by Appellant and Respondents in the Motion for Summary Judgment, the essential facts considered by the Trial Court were as follows:

Respondents, Joan Ross and Frank Ross, were married on May 13, 1961. Appellant, Vincent Briggs, became acquainted with Joan Ross in 1967 while he was giving tennis lessons on the tennis court at the home of Respondents. Between 1967 and October 1975, Joan Ross and Appellant engaged in sexual intercourse numerous times including,

without limitation, the months of August and September of 1969. (Declaration of Vincent Briggs in Opposition to Motion for Summary Judgment.) Zan Ross was born May 11, 1970 as a result of a normal term pregnancy. (Declaration of Frank Ross in Support of Motion for Summary Judgment.)

Joan Ross told Appellant that (1) she and her husband, Frank Ross, had no sexual relations; (2) that Joan Ross and Frank Ross slept in separate bedrooms; (3) that Joan Ross explained her pregnancy to Frank Ross by telling him that she had gone to a doctor for artificial insemination; (4) that Frank Ross accepted this and also expressed his belief that his son, by a former marriage, was not his either; and (5) Joan Ross told Appellant that Zan was conceived as a result of the union between herself and the Appellant. (Declaration of Vincent Briggs, *supra.*)

In 1974, when Zan was approximately four years old, Joan Ross separated from her husband, Frank Ross. (That thereafter their marriage was dissolved.) Joan Ross moved to a residence on Bundy Drive in West Los Angeles, California that did not have a tennis court. That the Appellant continued to visit Zan at least two to three times per week and would take him out for the day on Saturdays. In addition, Appellant took Zan to Appellant's home and Zan would spend the night there with Joan Ross' permission. (Declaration of Vincent Briggs, *supra.*) From the time of Zan's birth, Appellant saw Zan as often as possible. He visited him, generally two to three times weekly, up to and including September of 1975.

In October of 1975, Joan Ross and Appellant had a serious argument and their relationship terminated. The visits of Zan and the Appellant continued but on a more limited basis of approximately three times per month. Appellant continued to speak to Zan by telephone often. In 1977, Joan Ross

terminated all of Appellant's visitation privileges with Zan. Appellant, during their relationship, and after its termination, openly told anyone who inquired as well as friends who did not inquire, that Zan was Appellant's son. (Declaration of Vincent Briggs, *supra*.)

The housekeepers caring for Zan at the Ross residence believed that Zan loved the Appellant and that the Appellant loved Zan. Zan and the Appellant used to have long telephone conversations. The housekeepers believed that Zan seemed happier with Appellant than with anyone else. (Declarations of Jesus Esperanza Barajas and Esparanza Vargas in Opposition to Motion for Summary Judgment.)

In 1977, shortly after Joan Ross terminated Appellant's visitation privileges, the Appellant filed a lawsuit to Establish Father and Child Relationship and For Visitation Rights to Zan.

On September 19, 1980 the Court granted Respondents' Motion for Summary Judgment on all grounds and dismissed the Appellant's Complaint.

On September 30, 1980, Appellant filed a timely Notice of Appeal and a Notice Designating Papers and Records on Appeal.

The Appellant contended on appeal that Evidence Code Section 621 was unconstitutional and under the circumstances of this case Evidence Code §621 should not be applied. The Respondents contended that Appellant was precluded from claiming paternity of the minor based on the conclusive presumption of Evidence Code Section 621.

On October 5, 1981 the Court of Appeals heard oral arguments by the Appellant and Respondents.

On December 8, 1981 the Court of Appeals filed their Opinion confirming said Judgment. A copy of said Opinion is included herein as Appendix "A".

On January 18, 1982 the Appellant filed for a Petition for Hearing before the Supreme Court of the State of California. The Supreme Court of the State of California denied Appellant's Request for Hearing on February 17, 1982. A copy of said Order denying a Hearing is included herein as Appendix "B".

On April 21, 1982 the Appellant filed a Notice of Appeal to the Supreme Court of the United States. A copy of said Notice of Appeal is included herein as Appendix "C".

FEDERAL QUESTIONS ARE SUBSTANTIAL.

A. Introduction.

The question presented is whether the conclusive presumption contained in California Evidence Code Section 621 which, in effect, denies a natural father and his child the right to legally establish their relationship and any right incidental thereto, constitutes a denial of due process under the Fourteenth Amendment.

The question is substantial in that application of such a presumption in the absence of a full and fair hearing determining the best interests of the parties involved, and weighing competing interests, results in an arbitrary denial of that most fundamental right of every natural father whose child is born during the marriage and cohabitation of the mother with a husband who is not impotent or sterile, to know and relate to his child and the corresponding right of the child to such a relationship with his natural father. These rights are paramount human rights that must be zealously guarded.

The ultimate result of such a presumption is especially insidious in that it operates against a father who most likely would be an excellent parent and deprives the child of the right to know and benefit from the companionship of a sincere and dedicated father. A father who diligently pursues

these rights in the face of overwhelming legal obstacles and who is willing to assume the legal and moral responsibilities involved, certainly possesses the qualifications to make a valuable contribution to the upbringing of his child. The conclusive presumption involved, arbitrarily deprives the father and child of these most precious human rights permanently and irrevocably. The potential loss to father, child and society is incalculable.

B. Triable Issue Exists as to Appellant's Paternity.

The declarations filed on behalf of appellant in opposition to the Motion for Summary Judgment, contained inferences and evidence which raised triable issues of facts as to the Appellant's paternity. The role of the Court on hearing a Motion for Summary Judgment is merely to determine whether a dispute as to the relevant facts exists. The Court may not speculate on, or determine whose version of acts is correct or will ultimately prevail. Therefore, for the purpose of these proceedings, it must be assumed that there are triable issues of facts relating to Appellant's claim to be the natural father.

> "The Standard to be applied by the Trial Court in ruling on a Motion for Summary Judgment, as set forth in a recent opinion of this Court, is as follows:
>
> 'When a party moves for Summary Judgment . . . the Trial Court's function is to determine whether the case presents a triable issue of fact — issue finding, not issue determination, is the Court's function at this stage in the proceedings.' "
>
> *Hale v. George A. Hormel & Co.*, 48 Cal.App.3d 73, 81 (1975)

The applicable statute, California Code of Civil Procedure, Section 437c, itself provides a Motion for Summary Judgment shall be granted only if "all the papers submitted

show that there is no *triable issue as to any material fact . . .*" The statute provides that:

> ". . . Summary Judgment shall not be granted by the Court based on inferences reasonably deducible from such evidence if contradicted by other inferences or evidence, which raise a triable issue as to any material fact."

Since there was a triable issue of fact, the granting of the Motion for Summary Judgment is justifiable only on the basis that the conclusive presumption of Evidence Code Section 621 was applied.

C. There Was Not an Effective Weighing of the Competing Interests of the Parties.

The declarations filed on behalf of Respondents do not contain any allegations, inferences, or evidence upon which the Trial Court or Appellate Court could determine the best interests of the child, the natural father, the presumed parents and the state, or weigh the competing interests of all parties involved. The best interest of the child must be considered. (*In Re Reyna*, 55 Cal.App.3d 288 at 301 (1976).) There are no allegations contained in said declarations relating to the environmental and psychological circumstances of the child and the probable beneficial or detrimental effects upon the child if parental or visitation rights are awarded to Appellant.

There are three public policy values generally considered as justifying the state's interest in the conclusive presumption:

1. Preservation of integrity of family.
2. Protection of child from stigma of illegitimacy.
3. State's interest in having an individual instead of the state providing support.

The historical policies supporting the state's interest in the presumption are not factors under circumstances of this case.

The family unit has been dissolved as a result of a dissolution of marriage. The profound shift in public attitudes and the Uniform Parentage Act has removed any stigma of illegitimacy. Since the natural father is willing to assume financial responsibility, the state will not be required to provide support.

Therefore it must be assumed that there was no meaningful determination of the best interests of the child or weighing of the competing interests of the parties and the state.

D. The Presumption Results in a Denial of Due Process.

The determination of issues of such paramount importance to the parties demands that there be full and fair hearing on the merits which includes the rights to subpeona and cross examine witnesses, obtain and produce necessary documents, and utilize the services of expert witnesses. The review by the Trial Court of self-serving declarations alone cannot furnish the background material and personal information necessary to properly determine the best interests of the child. The mere fact that the mother and presumptive father cohabitated together should not in itself, be determinative of parental qualifications.

The fundamental and compelling right to establish a claim to paternity must prevail in the absence of powerful countervailing interests. The right of an unwed natural father in custody of his children was recognized by this Court in *Stanley v. Illinois*, 92 S.C. 1209, 405 U.S. 646 (1972). This Court found that a statutory presumption which arbitrarily interferes with the unwed natural father's parental

rights is a denial of due process. The Court stated on page 657:

> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."

E. A Reasonable Alternative Is Available.

These important interests of both parent and child can be resolved consistent with due process and the best interests of all parties. Modern scientific methods can determine paternity to an almost absolute certainty. If Appellant is found not to be the father, the uncertainty that presently plagues the parties will be completely resolved. If it is determined that he is the father, a full and fair hearing in which the parties are accorded all due procedural rights can be promptly held. Similar proceedings in which custody and visitation rights of children are determined, are commonplace in the State Courts. This is a reasonable alternative. It would further the truth, accord due process, and provide a determination of the best interests of those involved.

In the case of *Vlandis v. Kline*, 412 U.S. 441 (1971), the Court stated:

> ". . . It is forbidden by the Due Process Clause to deny any individual (rights) . . . on the basis of a permanent and irrebutable presumption . . ., when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination . . .". at 452.

F. The Presumption Denies Appellant Due Process and Equal Protection as to Visitation Rights.

California Civil Code Section 4601 grants the Court discretion to award visitation "to any other person having an interest in the welfare of the child."

The Respondents have contended that unless Appellant is first established as the legal father, he is not a person interested in the welfare of the child and is not entitled to a visitation order under the statute.

The Court of Appeal summarily dismissed Appellant's contention that he is a "person having an interest in the welfare of the child," and therefore eligible to be granted visitation rights in the Court's discretion, primarily on the basis of the legal impossibility resulting from Evidence Code Section 621. The Appellate Court's contention that the Court ordered visitation would be detrimental to the best interests of the child is not supported by the record. The conclusive presumption of Evidence Code Section 621 therefore has been applied to deny Appellant his right, not only to obtain a declaration of his parental rights but also to establish himself as a person interested in the child's welfare. Certainly, as a natural father, he is "a person interested in the child's welfare".

As such, Appellant should be granted a hearing to determine visitation rights. The arbitrary denial to Appellant of an opportunity to establish himself as "a person having an interest in the welfare of the child" by reason of application of the conclusive presumption, constitutes a Denial of Due Process and Equal Protection.

CONCLUSION.

The paramount rights of the individuals involved and the growing number of persons who will be affected in the future by the conclusive presumption of Evidence Code

Section 621, demands a determination by our highest Court of its constitutionality.

Fundamental rights of such importance must be governed by the truth and the best interests of the parties involved. These rights can only be protected by a hearing in compliance with constitutional standards.

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted.

LAWRENCE & LAWRENCE,
A Law Corporation,
By SULL LAWRENCE,
Counsel for Appellant.